IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 833 of 1989

with

CRIMINAL APPEAL No 835 of 1989

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

ALAMKHAN MAHMADKHAN PATHAN

Appearance:

1. Criminal Appeal No. 833 of 1989
   MR KC SHAH, APP, for Petitioner No. 1
   MR JM PANCHAL for Respondent No. 1
2. Criminal Appeal No. 835 of 1989
   MR KC SHAH, APP, for Petitioner No. 1
   MS SADHANA SAGAR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 01/09/2003

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.K.TRIVEDI)

1. The appellant-State of Gujarat has challenged the common judgment and order of acquittal recorded by the learned Additional City Sessions Judge, Ahmedabad City dated 31.8.1989 acquitting the respondent-accused from the offence under Section 20(B)(2) of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as "the NDPS Act") and under Section 66(1)(B) of the Bombay Prohibition Act while disposing of Sessions Case No.13 of 1989 by preferring appeal being Criminal Appeal No.833 of 1989, and appeal being Criminal Appeal No. 835 of 1989 challenging the judgment and order passed by the same Court on the same day acquitting the accused- Ayubkhan Mahmadkhan Pathan from the said offence while disposing of Sessions Case No.41 of 1989. As the learned trial Judge had disposed of both the Sessions cases by his common judgment and order, we propose to dispose of both these appeals by this common judgment.

2. We have heard Mr KC Shah, learned Additional Public Prosecutor at length who in turn while arguing the case has taken us through oral as well as documentary evidence led by the prosecution during the trial of the case before the trial Court as well as the judgment under challenge. It is the contention of Mr Shah that in light of the evidence led by the prosecution, the learned trial Judge was not justified in acquitting the accused and the learned trial Judge has not properly appreciated the evidence led by the prosecution, which has resulted into miscarriage of justice. It is also the contention of Mr Shah that as found from the evidence, Shri Parmar who was the Designated Officer as contemplated under the provisions of the NDPS Act and as found from his evidence, the prosecution has established that during the raid carried out at the premises of the respondent-accused, a large quantity of narcotic substance was found and recovered and as per the FSL report, the said substance which was seized from the accused established that the said substance is a narcotic substance and the learned trial Judge ought to have accepted the evidence of the prosecution and ought to have recorded the order of conviction convicting the accused.

3. Mr Panchal, learned advocate appearing for the respondent-accused has supported the judgment under challenge recorded by the learned trial Judge acquitting the accused and according to Mr Panchal as per the admission made by the raiding officer Shri Parmar PW 1 as well as Shri Dharampal Bangia PW 10 who in term has admitted that no information was written down by Shri Parmar when he received the secret information from the informant and PW 10 Shri Bangia has further admitted that during his investigation he has not come across any document on which the information was written down by officer Shri Parmar in respect of the narcotic substance. Mr Panchal has also vehemently urged that there is no compliance of mandatory provisions of Section 42 of NDPS Act. Mr Panchal next urged that this being an acquittal appeal when the learned trial Judge has after appreciating the evidence led before him has recorded a finding by not accepting the prosecution case and order of acquittal is recorded, according to him, this Court will be slow in interfering with the order of acquittal recorded by the learned trial Judge based on appreciation of evidence.

Mr Panchal has also next urged that when the learned trial Judge has on appreciating the evidence held that the prosecution has failed to establish with regard to the ownership of the property from where the substance was seized by Shri Parmar and the member of the raiding party and when the prosecution has failed to prove the possession in respect of the narcotic substance and when the learned trial Judge has accordingly held against the prosecution, this Court will not upset the finding by reversing the order of acquittal into conviction and he prayed that the appeals filed by the State be dismissed.

4. As found from the record, it is the prosecution case that Shri Natversinh Parmar, Police Inspector, Crime Branch had received the secret information from the informant on 1.4.1988, and as per the information, after following the required steps as contemplated under the NDPS Act, he carried out the raid in presence of panchas and the raiding party had seized 9 kgs. of charas, and the substance which was seized was sent for analysis before the Forensic Science Laboratory, and as per the report of the FSL, the substance examined was found to be a narcotic substance.

As found from the charge that on 1.4.1988 between 12.15 to 14.15 hours at the residential premises of the accused in Khajuri Pole, Baluchawad, Kalupur, Ahmedabad,

the accused were in possession of 9 kgs. of narcotic substance, namely, charas without pass or permit or licence, and thereby, the accused have committed offence under Section 20(B)(2) of the NDPS Act and the offence under Section 66(1)(B) of the Bombay Prohibition Act.

5. As found from the evidence of PW 1 Shri Natversinh Parmar who was at the relevant time working as Police Inspector in Crime Branch i.e. on 1.4.1988 at the DCB office at 12 noon. He received a secret information from his informant that Alamkhan Mahmadkhan Pathan, respondent in Criminal Appeal No.833 of 1989, and Ayubkhan Mahmadkhan Pathan, respondent in connected Criminal Appeal No.835 of 1989, are doing business of sale of narcotic substance, namely, charas by keeping the narcotic substance in their possession in their residential premises, which is in their possession. On getting this secret information, he made arrangement for calling two panchas and after explaining both the panchas about the information who in term had agreed to remain and act as panchas. Thereafter, a preliminary panchnama was drawn. In the said preliminary panchnama, both the panchas and Mr Parmar had put their signature. After drawing the preliminary panchnama, he along with the two panchas and other police personnels, namely, Shri KK Patel, Police Superintendent, Shri DB Bangia, Police Sub-Inspector, Shri BK Jadeja, Police Sub-Inspector, Shri KD Pandya and other staff members had in a Government vehicle proceeded towards the place of information through Khamasa gate, Astodia darwaja, Sarangpur circle, Kalupur circle, Prem darwaja and Vaghriwad and reached at the corner of Khajuri Pole at Baluchawad. There they had parked their vehicles and by foot had gone to Khajuri pole. By climbing the ladder they had come on the second floor of the building, and on seeing them, accused Alamkhan Mahmadkhan Pathan came out from the middle room and ran away by jumping from the roof of the house. The police personnel chased him but he could not be apprehended. On seeing the room from which the accused Alamkhan had ran away, it was found that there was one iron cupboard on the left side of the room towards the wall on the eastern side and another cupboard towards the wall on the southern side. On checking, nothing was found from the room. The iron cupboard was found to be locked and the keys for the same were not found and by using force the iron cupboard was opened from which one bag was found. On opening the said bag, there was one paper written in Urdu language. On opening the paper, one plastic bag was found and on opening the said bag, 39 round balls of charas of different size were found. The said substance was smelt by Shri Parmar as well as by the

panchas and it was confirmed that the said substance was charas. From the said round balls of charas, samples were taken out and the same were wrapped in a plastic paper, which was also further wrapped. The signed slips of panchas with the seal of DCB was applied. The remaining round balls of charas were packed in a plastic bag. The said plastic bag was covered with the urdu paper and thereafter it was also wrapped with a wrapper. The sheets signed by Mr Parmar and the other panchas and seal of Police Inspector, DCB was applied.

Shri Parmar has also deposed that a panchnama to that effect was drawn in presence of panchas which was signed by him as well as by the two panchas. Thereafter, he filed a complaint against the accused on behalf of the State. That was written down by his writer constable. The panchnama was prepared at the place where the narcotic substance was found, and the complaint was given and written at the police station. Through his evidence, he has proved the complaint as well as the report submitted by him which are at Exh.16 and Exh.17. As found from his evidence, one muddamal box was shown to him which was in sealed condition and the said seal was not readable. The witness in his examination-in-chief has deposed that the muddamal, which was seized and sent to FSL and shown to him in the Court, was not sent in the box from which it was taken out. According to him, the muddamal which was seized and on which slips signed by the panchas as well as by him with the seal of Police Inspector, DCB Crime, was sent for analysis. He had not sent the muddamal in the box shown to him and he had not applied the seal on the said box. The remaining muddamal which was kept and preserved and wrapped with the wrapper with the slips signed by the panchas was handed over by him to the PSO and he also handed over the sample which was seized to the PSO.

In the Court, Mr Parmar has also identified the muddamal which was seized by him and also identified the keys which was seized. As the cupboard was locked, the same was opened by applying force by using iron pipes. Shri Parmar has also identified both the accused present in the Court. While identifying accused Alamkhan, witness Shri Parmar has deposed that he knows the accused because earlier he had arrested accused Alamkhan in connection with the offence under Section 302 of IPC, which was registered at Kalupur Police Station vide CR No.166 of 1985.

In the cross-examination, PW 1 Shri Parmar has deposed that the offence which was registered at Kalupur

Police Station under CR No. 166 of 1985 was in respect of murder of PSI Rana, and during the investigation of the said case, the accused absconded and subsequently after his arrest, supplementary chargesheet was filed. The said accused Alamkhan was arrested under transfer warrant and not from his residential place. He has further deposed that he had not kept the informant present while carrying out the raid, and the informant had not given the number of the house of accused-Alamkhan Pathan. The witness in term has deposed that he has not even tried to find out the house number of accused Alamkhan Mahmadkhan Pathan from the record of the Police Station nor he had tried to enquire about the topography of the residence of the accused, as according to the witness Mr Parmar, he was knowing the house of accused No.1. The house at which the raid was carried out was seen by him earlier during the inquiry of the offence which was registered under CR No.166 of 1985 and whenever he visited the house of the accused for inquiry, the same was found to be locked. The neighbours of the house of the accused were also not knowing him as P.I. Crime Branch and he had also not made any inquiry from the neighbours of the accused when the house of the accused was found locked. The witness had admitted that another house of the accused is also situate in the same pole and there he resides with all his family members. The said another house of the accused Alamkhan is at a distance of 25 to 30 steps and on the day of the raid i.e. on 1.4.1988, they also carried out search of the second house of the accused in presence of the panchas. According to the witness that house was searched after about ten minutes of completing the panchnama in the first house and the search had taken place for about 10 to 15 minutes. At the time of the search that house was found opened and no one was present. In the cross-examination, Shri Parmar has also admitted that the house at which the raid was carried out and from where the muddamal was seized has no number. Mr Parmar has also admitted that the information which he received from the informant was not recorded in writing.

The witness was also cross-examined at length by the defence in respect of the case put forward by the witness as well as the prosecution that at the time when the raiding party had entered the house, as per the information of the informant, by climbing the ladder, from the middle room the accused ran away by jumping from the roofs of the other nearby houses. The witness could not remember the height from which the accused jumped on seeing the members of the raiding party. It is also found from the cross-examination that police personnel

who had ran towards the accused-Alamkhan had informed him that the accused could not be traced and he has admitted that in his FIR he has not disclosed the names of the two police personnel who chased to apprehend the accused. In the cross-examination, the witness has further deposed that he was the first person to enter in the room and along with him two panchas were there and Shri Patel was near the gallery. He has admitted that when Alamkhan ran away from his house, at that time, all the police personnel had come upstairs. He has not noted down the damage caused to the cupboard in the panchnama while opening the said cupboard. He has also admitted that he has the authority to seize the cupboard from which the charas was found. Further he has admitted that he believes that if the keys of the cupboard could be found then the person who was using the cupboard can be found out. He has admitted that he has not seized the cupboard as according to him, it was not necessary for him to seize the cupboard. After the raid was over, they had not locked or sealed the room nor they had posted any police personnel there and they just closed the door from outside.

In respect of drawing panchnama, the witness has in term deposed that they had completed the panchnama at 14.15 hours and they had started the panchnama of the other house of the accused i.e. Ex.19 at 14.25 hours and during the period between 14.15 to 14.25, he could not say what he had done. After coming out from the room which was raided, he had not gone in the said room again. He could not also say that at what time he handed over the muddamal to PSO.

According to the witness, in the FIR as well as in the panchnama he had applied the seal of "Inspector of Police, Crime Branch, Ahmedabad City" and in their police station, there is no separate seal of "PI, DCB, Ahmedabad City". Regarding panchas to the raid, he has denied that the two panchas were not the residents of Ahmedabad as both the panchas are residing in Shahawadi, and from the place of incident, Shahawadi is about 10 to 12 kms. away. He deputed a constable for securing the presence of two panchas. He has denied that these panchas are known to him and shall depose as per his say, therefore, he has taken their services to act as panchas.

It is further found from the cross-examination on behalf of accused No.2 that in the murder case of PSI, Rana a supplementary chargesheet was filed against accused-Alamkhan and as he had filed the chargesheet against Alamkhan his name was shown as one of the

witnesses in the said case. He could not remember that when the supplementary chargesheet was filed against the accused whether the main accused were acquitted by the Court or not. He has further admitted that in the murder case of PSI Rana, accused-Alamkhan was acquitted. Alamkhan was under police remand between 10.11.1987 and 15.11.1987 and thereafter he was sent in judicial custody. He could not remember that while the accused was in jail the accused was detained under the provisions of National Security Act. He could also not remember that whether the said detenu was released from detention by the Advisory Board. The premises at which they had carried out raid which is situate in Khajuri pole, Baluchawad is within the jurisdiction of Kalupur Police Station. Kalupur Police Station is situate on Relief Road, Opp. Dhanasuthar-ni-pole, and from Kalupur Police Station, the place of incident is at a distance of 1 km. while the Crime Branch Police Station is at a distance of 4 kms.. The witness has further deposed that the FIR in the present case could have been given in the Kalupur Police Station. The muddamal which was kept in big brown cover and from which the samples were taken was not sent to the FSL.

Shri Parmar who is the complainant, PW 1, has proved the complaint which was filed by him against the accused on 1.4.1988. The report Ex.17 addressed to the PSO of Crime Branch, Ahmedabad is also proved. Ex.19 is the panchnama in respect of the other house of the accused. Search in presence of two panchas Laxmansingh Motisingh and Jayantibhai Surabhai Bharwad on 1.4.1988 between 14.25 to 14.45 hours.

6. Shri Jamnadas Kanjibhai Vaishnani PW 2 was at the relevant time working as a Senior Scientific Assistant cum Assistant chemical Analyser with the Forensic Science Laboratory, Ahmedabad. On 18.4.1988, the muddamal from DCB Police Station under CR No.7/88 was received and accepted in their office for chemical analysis and the acknowledgment receipt was issued by Shri JM Vyas, Assistant Director, which is proved at Ex.21. PW 2 Shri Vaishnani has examined the said muddamal substance on 21.11.1988 and he was assisted by Shri RK Solanki who was working as a Junior Scientific Assistant. The muddamal were in sealed packet but the seals were not legible. On the paper of the packet there wa a seal of police station with CR number. On opening the packet, below the seal, one slip was found having signatures of Laxmansingh Motisingh and Bharwad Jayantibhai. Inside the plastic bag, 37 blackish and brownish substances were found and the net weight of all the substances was found to be 48

kgs. He examined the substances from different chemical methods and with Thin layer chromatography pattern. He has also carried out Para Amino Phenol test and the result was positive. After the substances were examined chemically, the same were sent to the Biological department for botanical test. All the 37 pieces were found to be charas. Smt. AD Nandi has also submitted her report which was done in the Department of Biology and the same is proved at Ex.23. The biological report was received by him on 11.1.1989. On 19.1.1989 his report and the biological report were sent to the Police Inspector, DCB, Ahmedabad. According to the witness, for chemical analysis as well as for botanical analysis, they require minimum 1 gm. of substance, and if he is given is 0.2 mgm. then from that also he can say that the substance is charas.

In the cross-examination, he has admitted that he is a Science Graduate with B.Sc. Chemistry and in the said course, there is no syllabus or any information regarding charas and during his study in B.Sc., in his syllabus, there is no subject regarding analysis of charas. He has further admitted that he has not been authorised to examine or analyse the samples which were seized under the provisions of Drugs & Cosmetics Act. He has admitted that special instruments are required for processing and analysing drug samples. He has not been given any training by the Government for analysing the substance charas. He has not even taken any training in Government Drug Laboratory where the training is given for analysing the substance charas and he has not examined any substance which are covered under the Drugs & Cosmetics Act. The witness has denied the suggestion that it is not true to say that if the substance is sent less than half a gram then one cannot analyse the said substance and he has denied that if the police sent muddamal substance of weight between 2 gm. to 5 gm. then he cannot analyse the same. He has admitted that while giving deposition in Sessions Case No.16 of 1989 in his deposition he had deposed that they cannot analyse the substance if sample for analysis sent by the police is of weight less than half a gram. He has examined all the 37 samples differently and in his work-sheet statement he has not stated that how many samples of substance were analysed by him. For examining 37 samples, he has 37 times tested the substance personally and Mr Solanki was assisting him by giving some instruments. He has not mentioned in the worksheet about the analysis that he carried out from 21.11.1988 and thereafter. However, according to the witness, he completed the analysis of all the 37 samples within four

to five days. Ex.24 the analysis report was written by him and the witness has admitted that the results of the Duquenois/Levine test, Beam's Alkali test and P-Amino Phenol test are in the handwriting of Shri Solanki. In the cross-examination, it is further found that the witness has admitted that when he gave his opinion that the substance is charas, he did not mention the percentage of cannabis sativa and resin. In Ex.24 report of FSL, Ahmedabad, in the description column of sample, it is mentioned that inside one sealed cover packet, there wa one plastic paper under which 37 blackish and brownish substances were found, and in all 37 samples, charas was found having total weight of 48 gms.. As per the FSL report and the result of the examination, the contents of all the 37 samples have been found to be of charas.

7. From the deposition of PW 3 Laxmanji Motiji Thakore, it is found that on 1.4.1988 at about 12 noon, while he was going to Bazaar on the way towards Haveli, one police constable asked him that whether he is prepared to act as a pancha and the witness said "yes" and he along with the police constable had gone to Haveli Police Station where he met PSI Parmar. In the police station, other police officers were also present. He was told that they have to go for carrying out raid at Baluchawad. As he had agreed to remain and act as a pancha, a preliminary panchnama was drawn in the police station and he had put his signature in the said document. He is uneducated but he can sign. The raiding party headed by Shri Parmar and other officers with panchas had proceeded in a Government vehicle and the vehicle was parked at the end of Khajuriwad pole. From there all went by foot towards one house having floors. First Parmar Saheb proceeded in the ladder and after him other police personnels were there and after them both the panchas were there. They raided at the first floor and the middle room was opened and on its both the sides there were houses. He saw one person running and the police personnel chasing him. The accused Alamzeb could not be apprehended. Inside the room, Shri Parmar and other police personnel were making search. There was one wooden cupboard. On opening the said wooden cupboard, nothing was found. There was one iron cupboard, but no keys were found. The police brought some instruments and the said cupboard was broke open. From the cupboard, one bag with chain was found. The said bag was taken out from the cupboard and on opening the bag, some substances were found covered with paper. He could not say how many substances were there. However, according to the witness, the police had taken sample from each balls and

the same was shown to him as well as to other person and they confirmed that the substances were charas. The said bundle was put in a box. They put their signature on the slip and that was sealed. The remaining substances of muddamal was also packed and a panchnama was drawn to that effect which was also singed by him and the other panchas. He identified the signature on the slip. It is further found from the evidence of this witness that the accused Alamzeb ran away and with the passage of time he cannot identify him even if he is present in the Court.

In the cross-examination, the witness has admitted that he never went back again to the police station and even on the next day he had not gone to the police station. The other house was also raided in his presence but he could not say the exact time. That house was having 5 to 6 floors but he cold not say that the raided house was situate at which floor. He could not also remember whether any other member was present or not in the said house. They had remained in the room from where the charas was seized from about 2.00 to 2.15 PM. The witness has further deposed that the panchnama was drawn outside the room while sitting in the osri. He has admitted that the area of osri is hardly about 2 ft. in width. The witness has also further deposed that first signature he had put in the police station and remaining signature near the house. He could not remember that how many signatures he had put in the blank papers. He had never acted as pancha prior to this raid and he had not seen Shri Parmar before the raid. It is further found from his deposition that he had admitted that he was knowing Shri Parmar even prior to the incident. However, the witness has deposed that he knows Shri Pandya Saheb and through Pandya Saheb he knows Shri Parmar. Shri Pandya was in service at Narol and he used to come to him often. He denied the suggestion that at the instance of Shri Pandya a man was deputed from Narol. It is also important to note that the witness in term admitted that he remained and acted as a panch at the instance of Shri Pandya and the raid premises was consisting of 4 to 5 floors. The gallery is a covered gallery and from there one cannot vanish. AS there was darkness in the room, he immediately came out of the room. In the gallery, about 10 to 15 persons of public were standing. The police personnel came with the bag and the said bag was opened by the police in the gallery and the persons who were standing there were murmuring that Alamzeb is of Mumbai.

Though PW 3 panch Laxmanji has supported the prosecution case, from his evidence it transpires that he acted as a panch at the instance of Shri Pandya. He has

a business of grocery situate at Shahwadi.

8. PW 4 Mohiyuddin Shah Mohammed, the panch witness, has not supported the prosecution and he turned hostile to the prosecution. The prosecution has examined PW 4 Mohiyuddin Shah Mohammed who acted as a panch on 27.5.1988 . After arrest, accused Alamkhan Mohammed Khan was under police remand. The said accused had agreed to take out the keys of the cupboard which was broke open by the police which was found in house No.2529 where the charas was found on 1.4.1988. Mohiyuddin Shah Mohammed has not supported the prosecution and as per panchnama Ex.33 at the instance of the accused, Alamkhan Mohammed Khan Pathan he has produced 11 keys with the key chain which was seized under panchnama on 27.5.1988.

Another panch has not been examined by the prosecution.

9. To connect the accused with the premises where the police has seized charas, the prosecution examined Jalaluddin K. Shaikh, a practising advocate at Ahmedabad. As found from his deposition, he is a practising lawyer since last 20 years and he knows Najmunnisa Kalanderkhan. The said Najmunnisa is wife of Kalanderkhan and residing at London. Being a neighbour, he is managing the affairs of their house. Najmunnisha has about 12 to 13 houses in the said pole. He does not know that the number of that house is 2529. The house was of Mohammed Jaan. The said Mohammed Jaan is residing in Khajuri pole in Najmunnisha chawl. Mohammed Jaan had approached him and asked him that he wants one house for Ayub to which he replied that the owner of the house is staying at London and he cannot change. While managing the affairs of Najmunnisha, it is his say that he was collecting the rent. Mohammed Jaan came to his office situate at Bhadra. Shri Shaikh has deposed that Mohammed Jaan had asked him that he wants this house for Ayub and the witness Shaikh has stated that Najmunnisha is staying at London and he cannot change the rent note and it is only possible after the landlord comes. Mohammed Jaan informed him the possession is already taken. The owner of the house came from London and he told that Mohammed Jaan's house is being taken by Ayub and accordingly the the land lady had gone for inquiry. After two to four days, Najmunnisha came and informed that Ayub is staying in Juhapura Sarkhej and he had no other talk with the landlady and thereafter the landlady had gone to London. The police has recorded his statement.

In the cross-examination, the witness in terms

stated that he has never visited the chawl at any time and the tenants used to come to pay rent either to his office or at his house. He is not knowing Mohammed Jaan Ayub.

10. At this juncture, it is necessary for us to refer and discuss the evidence of PW 10 Dharampal Bangia. He was working as PSI with the DCB police station. On 1.4.1988 at about 12 noon he was called by Shri Parmar. Shri Parmar had also called other Officers. Parmar Saheb told that information is received that Alamkhan Mohammed Khan Pathan and Ayubkhan Mahmad Khan Pathan residing in Baluchawad, Khajuri pole are having charas and they have to go for raid. Parmar Saheb had deputed police persons for seeking presence of two panchas. The other police persons from the police station were also called. Parmar Saheb with the raiding party, accompanied with Shri KK Patel and other police staff with panchas, proceeded in a Government vehicle towards Khajuri pole. After parking the car, Shri Parmar Saheb, two panchas and all the members of the raiding party raided the house. While climbing the ladder, Parmar Saheb was first and after Parmar Saheb two panchas were there and after the panchas, witness Bangia and other police personnel were proceeding. When they reached at the second floor, Parmar Saheb and two panchas were on the last step and he was behind them. There were three rooms. In the middle of the room, Alamkhan ran away by jumping from the right hand side of the roof of the house. The witness along with other police persons chased him along with Shri Parmar. After some distance on the right hand side, he and Parmar Saheb had stopped and the other police personnel ran further to apprehend the accused. In the room from which Alamkhan ran away, Parmar Saheb with the two panchas and other police persons entered the said room. In the said room, there was one iron cupboard which was locked. The said cupboard was broke open and from inside the cupboard, one rexine bag was found. On opening the rexine bag, it was found that there was one paper in urdu language having tied with plastic thread. On opening the same, there was one plastic bag and after opening the said plastic bag, there were found balls of black and brown colour. On counting the said balls, they were found to be 39 in number. The same were smelt by him as well as by panchas and the smell was found to be of charas. Shri Parmar had taken sample from each round balls. The witness also in term has deposed about taking sample from each ball by Shri Parmar and the same were put in a box and the seal was applied with the signature of two panchas. The witness has also in term deposed that thereafter the other house of accused Alamkhan

Pathan was raised in presence of panchas. However, nothing objectionable was found and the panchnama was drawn to that effect in presence of the panchas which was signed by both the panchas and Shri Parmar. In the meantime, the police personnel who ran to apprehend Alamkhan informed that Alamkhan was not apprehended. The raiding party thereafter with the Muddamal came to the DCB office. Thereafter at about 4 PM PSO DCB handed over the papers for investigation of the case. On 2.4.1988 he had also informed the Superintendent of Customs about the raid and thereafter continued for search of the accused. On 25.5.1988, he received the information that accused Alamkhan is in Ahmedabad at his in-laws house at Shahpur. Accordingly, he went and checked the said house where the accused was found and arrested. After the arrest of Alamkhan, the said accused was produced before the Chief Metropolitan Magistrate on 26.5.1988 and remand was obtained upto 30.5.1988. During remand, on 27.5.1988, accused had shown his willingness to produce the keys of the cupboard and accordingly he called two panchas and after explaining the said fact to the panchas, a preliminary panchnama was prepared and he obtained the signatures of the panchas as well as he had also put his signature on the said panchnama. Thereafter, he in company of other police persons and other persons with accused Alamkhan had gone to the house of the father-in-law of the accused at Shahpur. Alamkhan entered the house. After entering the first room, he entered the second room and from the cupboard lying on the left hand side, had taken out one bunch of keys, which was seized, which he has produced. A panchnama to that effect was prepared and the panchas had put their signature on the said document as well as he had also signed the said panchnama. After drawing the panchnama, he went back to the office of DCB and the muddamal was handed over to the PSO for panchnama receipt. The PSO issued the receipt for having received the muddamal and the muddamal was handed over to the muddamal writer head constable. The PSO returned the panchnama with the muddamal receipt. He has proved the said muddamal receipt. It was in the handwriting of PSO which is at Exh.42. After obtaining keys from the writer head constable, they went at Khajuri pole situate at Baluchawad where the charas was seized, where two panchas were called. There the keys were applied to the cupboard lying in the said room, and with the help of key bearing No.42, the cupboard was opened and panchnama to that effect was prepared. The witness identifies the panchnama as well as muddamal article No.4, namely, the keys which were seized at the instance of the accused. On 18.4.1988, samples of charas were called through his

Writer Constable Laxmisinh Magansinh from Crime Writer Head Constable, and the said samples were forwarded with the letter to the FSL through police constable Mohansinh Chimanlal. Mohansinh Chimanlal haded over the said samples with the letter at the FSL, for which FSL had issued a receipt for having received the said samples. As the remand period of accused Alamkhan was over, the said accused was produced before the Chief Metropolitan Magistrate on 30.5.1988. He was continuously inquiring about the accused Ayubkhan Mahmad Khan Pathan. He has also recorded the statement of advocate Shaikh. The chargesheet was filed against Alamkham Mohammed Khan Pathan on 30.8.1988 and the all muddamal except muddamal samples were forwarded to the Court in one iron box. The absconded accused Ayubkhan Pathan was arrested from Vasan Bus stand on 9.1.1989 and the said accused was produced before the Magistrate for remand and remand was not granted. Hence the said accused was sent in judicial custody and supplementary chargesheet was filed against the said accused before the Court on 16.1.1989. He identifies the accused in the Court room. As Alamkhan was also one of the accused in murder case of PSI Rana, and the witness was working as a PSI since 1986 in Crime Branch, he had arrested the accused Alamkhan in the murder case of Rana and, therefore, he knows the accused.

In the cross-examination, the witness in term has admitted that during his investigation, the complainant had not given any written document in respect of the information which was received by him and further during his investigation, he has not found that the complainant Shri Parmar who had seized the muddamal and sealed the same, has reported it to the superior officer. He has not come to known, during his investigation, that to whom Shri Parmar had handed over the said muddamal, and he has also not come to know during his investigation, that Shri Parmar had at what time handed over the muddamal in favour of PSO. The witness has in term admitted that he has not recorded any statement of the witnesses with regard to this. In his cross-examination, he has deposed that from the documentary evidence which he gathered during his investigation, he came to know that the muddamal in question was handled by PSO Smt. Indiraben and other Crime Writer Head Constable Narayanrao, Police Constable Laxmansinh, Police Constable Kanaksinh and Police Constable Mohansinh. The witness in term has stated that he has not recorded statement of any of the witnesses. It is further found from the deposition that except the certificate regarding muddamal, no other documents were kept.He had not seen during his investigation the entry made in the register Exh.40. He

has further deposed that Laxmisinh was sent to collect muddamal on 18.4.1988, which date he deposed from his memory. The witness had denied that Laxmisinh had taken all the muddamal. He had not given anything in writing through Kanaksinh for taking the muddamal from Writer Head Constable. However, the witness has stated that he had orally informed. Kanaksinh had not made any report in writing about the work that he had done. He had not independently or through PSO prepared any inventory of the muddamal. He has admitted that from 1.4.1988 to 20.8.1988 he had not obtained any order regarding the muddamal from the Magistrate and he has not informed the Court that muddamal in question was in his possession from 1.4.1988 to 20.4.1988. The substances which were seized and sent for analysis were 39 balls but as per the FSL report it was found 37 balls and he has not made any inquiry that why 39 balls were sent and 37 balls only reached. They had no knowledge about the number of the house at which the raid was carried out and to find out the number, he has issued the letter to the Municipal Corporation. The witness has proved the letter addressed to the Municipal Corporation and the reply received from the Corporation which is at Ex.15. The witness has in term admitted that the raid which was carried out at the house, neither of the accused was in possession thereof, and no other evidence was collected that the possession of the house is of the accused except the statement of advocate Shri Jalaluddin. He has not recorded statement of nay of the neighbours though he had inquired. He has not seen the residence number of Alamkhan mentioned in the other offence registered at the Crime branch. He has admitted that the raid which was carried out on the second house on the very day, he does not remember the number of that house. It is further found from his deposition that on 27.5.1988 when they went to apply the keys which were seized from the accused, they had not obtained any warrant regarding search of that house. It is further found from his deposition that between 1.4.1988 and 27.5.1988 they had not made any arrangement to keep the articles which were found in the same condition. On 27.5.1988 they had not applied the lock to the house. The witness has denied that on the day of incident as they broke open the cupboard by using force, the same was broken. The witness has denied the suggestion that as they could not gather any evidence regarding possession of the house of the accused and to prove that the possession is of the accused, and that the key was seized from the accused and the same was applied upon the cupboard the said evidence was concocted. The witness has also denied that both the panchnama were prepared falsely subsequently. The witness also in term

has deposed that he could not disclose the name of the person who went after the accused. The witness has admitted that the raid premises is situate on the second floor and not on the first floor. It is further found from the deposition of the Investigating Officer that the accused Alamkhan arrested in respect of the offence of murder of PSI Rana was on bail in that case. While referring to Ex.50, the letter from the Corporation, the owner of the house is shown Pathan Saheb Sir Bilakhan Arifkhan. While referring to panchnama Ex.29, where the said house was raided there is no reference of house number, however there is a reference about the other house adjacent to the raiding house. Even in panchnama Ex.19 where the raid was carried out there also there is no number of the house. There is no reference about the colour of the cupboard in the panchnama and when they had gone at the house with the accused on 27.5.1988 to apply the keys, the cupboard was found in broken condition and there is no reference in the panchnama that whether that cupboard was opened or locked nor there is any reference that in the cupboard some articles were there or not. From Juhapura to the raiding house this is at a distance of about 11 kms.. The witness has also further admitted that on 9.1.1989 he raided the house of the accused Ayub at Juhapura Sarkhej. Ayub is having his wife and children. Before effecting arrest, he had made inquiry at Juhapura Sarkhej.

11. Shri Bangia who is Investigating Officer was also one of the members of the raiding party along with PW 1 Shri Parmar. Regarding the ownership of the house at which the raid was carried out, in the panchnama there is no house number mentioned. Ex.49 Shri Bangia had inquired about the ownership of the house from which the muddamal charas was seized and in reply Ex.50 from the Corporation suggests that the house is not belonging to the accused and the Investigating Officer has also admitted that no other evidence was collected by him except the statement of advocate Shri Shaikh. The Investigating Officer has also not recorded the statements of any of the neighbour of the house from which the charas was seized. All the prosecution witnesses have deposed that as per the information received by Shri Parmar and in presence of two panchas they proceeded at the place where as per the information the accused persons are processing narcotic substance, namely, charas and the information suggests that the place is a residential premises of accused Alamkhan Mohammed Khan Pathan. Both the accused are brothers. It is the case of the witnesses that at the time when Parmar had reached the last step of the ladder situate on the

second floor, the accused on seeing him jumped and ran away. Shri Parmar and Shri Bangia with the other police personnel had also chased the accused. However, the accused could not be apprehended. As observed earlier, while discussing the evidence of Shri Bangia, when the police personnel had informed him that the accused could not be apprehended, Shri Bangia could not give the name of those Officer who had informed him and who had gone to chase the accused.

12. So far as the possession of the house in question is concerned, it is not proved that house from where the narcotic substance namely charas which was seized during the raid was in occupation of any of the accused. As discussed earlier, that as per the FSL report, the substance which was sent for analysis was found to be a narcotic substance namely charas. However, to prove the case against the accused that the charas was found in a house which was belonging to the accused, the evidence led by the prosecution by examining advocate Shaikh also does not help the prosecution to prove that the raiding party had in presence of two panchas seized charas which was belonging to the accused. Not only that, but the Investigating Agency has also not brought any evidence in indirect manner to establish that the house in question from where the narcotic substance was found was in fact in possession of any of the accused. As Shri Bangia in term admitted that he has not recorded any statement of any of the neighbour to suggest that the possession of the house was of the accused. This being an acquittal appeal, and in light of the decision of the Apex Court, to examine the order of acquittal recorded by the learned trial Judge and the reasons assigned while acquitting the accused by the learned trial Judge and in light of the evidence recorded by the learned trial Judge that the prosecution has failed to establish that the narcotic substance which was seized by the police on the day when the raid was carried out was belonging to the accused persons, without discussing the other evidence led by the prosecution, it is not possible for us to convert the order of acquittal recorded by the learned trial Judge, which is based on appreciating the evidence, into conviction and accordingly, from the evidence which we discussed, it is difficult for us to accept the submission of Mr Shah that the learned trial Judge has committed error while appreciating the evidence led by the prosecution.

13. We are not discussing the contention raised by Mr Panchal that the prosecution has also failed to establish that at the relevant time during raid, the mandatory

requirement of the provisions of NDPS Act, namely, Section 42 is not followed, as we are confirming the reasoning of the learned trial Judge while acquitting the accused only on the ground that the prosecution has failed to establish that the muddamal charas which was seized by the police on 1.4.1988 and the house which was raided is of the accused and the accused were in possession of the said house.

14. In light of the decision in the case of Ramesh Babulal Doshi vs. State of Gujarat reported in AIR 1996 SC 2035, wherein the Apex Court has given guidelines while considering the acquittal appeal filed by the State and to deal with the appeal, in our view, this is not a case that the order of acquittal recorded by the learned trial Judge requires any interference.

15. Accordingly, both the appeals are dismissed. The order of acquittal of accused-Alamkhan Mahmadkhan Pathan passed in Sessions Case No.13 of 1989 on 31.8.1989 by the learned Additional City Sessions Judge, Court No.20, Ahmedabad city acquitting him from the offence under Section 20 (B)(2) of the Narcotic Drugs and Psychotropic Substances Act as well as from the offence under Section 66 (1) (B) of Bombay Prohibition Act, is hereby confirmed. Similarly, the order of acquittal of accused-Ayubkhan Mahmadkhan Pathan passed in Sessions Case No.41 of 1989 on 31.8.1989 by the learned Additional City Sessions Judge, Court No.20, Ahmedabad city acquitting him from the offence under Section 20 (B)(2) of the Narcotic Drugs and Psychotropic Substances Act as well as from the offence under Section 66 (1) (B) of Bombay Prohibition Act, is hereby confirmed. Rest of the order is also confirmed.

(D.K. TRIVEDI, J.)

(M.S. SHAH, J.)
zgs/-